SUPREME COURT, U. S.
FILED
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Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. ~~241~~ -

MARGARET CURRY, as Administratrix of the Estate of WILLIAM CURRY, deceased and Individually as the Widow and Next of Kin of WILLIAM CURRY, deceased,

Petitioner,

against

P. D. MARCHESSINI, INC., P. D. MARCHESSINI & CO., LTD. (also operating as P. D. Marchessini & Co., New York, Inc.),

Respondents,

against

ATLANTIC STEVEDORING CO., INC.,

Third-Party Respondent,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Applicant for Intervenor.

BRIEF FOR THIRD-PARTY RESPONDENT, ATLANTIC STEVEDORING CO., INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 16, 1969.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (McLean, D.J.) is reported at 274 F. Supp. 167 (1967), and is printed in full as part of petitioner's appendix to her petition (1a-3a).

The United States Court of Appeals for the Second Circuit affirmed without opinion.

Defendants' motion was predicated upon two grounds: (1) that the action was not timely brought, and (2) that it failed to state a cause of action as the Georgia death statute does not provide for a recovery based upon unseaworthiness.

The motion having been granted as to the first ground, no determination was made on the second ground.

Facts

The amended complaint alleges that on October 30, 1961, deceased, William Curry, employed in loading cargo aboard respondents' vessel, S.S. Eurylochus at Savannah, Georgia, sustained fatal injuries due to alleged unseaworthiness of personnel, gear and cargo aboard the vessel; that petitioner was, on January 13, 1964, appointed Administratrix by the Court of Ordinary for Chatham County, Georgia and that petitioner is a resident and citizen of Georgia; that petitioner sues for damages under the Georgia Death Statute.

It is undisputed that the instant action was commenced on March 3, 1964, more than 2 years after death, as pleaded in the ninth affirmative defense in respondent's answer.

Prior to the commencement of the instant action petitioner had made a claim for workmen's compensation under the Longshoremen's and Harbor Workers' Compensation

Act against deceased's employer, Atlantic Stevedoring Company, Inc., the third-party respondent herein and received an award which was thereafter vacated by the District Court (220 Fed. Supp. 881) as not being within the purview of that Act. On appeal to the U. S. Court of Appeals, Fifth Circuit, the order of the District Court was reversed 'for the entry of a judgment sustaining the award of the deputy commissioner" (*O'Keefe, Dep. Commis.* v. *Atlantic Steved. Co.*, 354 Fed. 2d 48).

Questions Presented

Was the action timely commenced? It is respondents' position that Judge McLean correctly held it was not timely commenced.

Applicable Statutes

Sec. 105-1302, Book 29, Georgia Stats. Anno.

> "Homicide of husband or parent.—A widow, or, if no widow, a child or children, minor or sui juris, may recover for the homicide of the husband or parent, the full value of the life of the decedent, as shown by the evidence."

Sec. 3-1004, Book 2:

> "Injuries to the person.—Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year."

POINT I

The Courts below properly dismissed the complaint.

The opinion of Judge McLean (1a-3a) is clear on the law.

This action is brought upon the Georgia Death Statute, set forth hereinabove, since the maritime law recognizes no action for wrongful death (*The Tungus* v. *Skovgaard*, 358 U. S. 588) and the federal courts are bound by the interpretation placed upon state statutes by the highest court of that state (*Cramp* v. *Board of Education*, 368 U. S. 278, 285; *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 432; *Garner* v. *Louisiana*, 368 U. S. 157, 166).

The Georgia statute of limitations of 2 years (§ 3-1004—hereinabove) has been held applicable to death actions by the Supreme Court of Georgia (*Atlantic, V. & W. R. Co.* v. *McDilda*, 135 Ga. 468, 54 S. E. 140; accord, *Chapman* v. *Central of Georgia Ry.*, 20 Ga. App. 251, 92 S. E. 1025; *Ivestor* v. *Southern Ry. Co.*, 61 Ga. App. 364, 6 S. E. 2d 214) and runs from the death of decedent (*Atlantic, V. & W. R. Co.* v. *McDilda, supra; Chapman* v. *Central of Georgia Ry., supra*), in the instant case, on October 30, 1961, more than two years before the commencement of this action.

This Court has held that such a limitation is binding when admiralty adopts such a statute.

In *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, the action was under the California Death Statute where a longshoreman was killed on August 5, 1916 aboard a vessel in San Francisco Bay, navigable waters of California. The action was commenced after the expiration of the one-year limitation period and, admittedly, the action would be barred if commenced in California courts, just as in the instant action the action would be barred in the Georgia courts.

In referring to its previous decision in *The Harrisburg*, 119 U. S. 213, this Court said (pp. 242-244):

"• • • Through Mr. Chief Justice Waite, this court said:

'The statutes create a new legal liability with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore, to be treated as limitations of the right.' See also *Davis* v. *Mills*, 194 U. S. 451, 453.

'An Act Relating to the maintenance of actions for death on the high seas and other navigable waters.' approved March 30, 1920, c. 111, 41 Stat. 537, gives a right of action for damages resulting from death caused by wrongful act, neglect or default occurring on the high seas beyond one marine league from the shore. It expressly directs, 'That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act. Nor shall this Act apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.'

> In the present cause the District Court rightly assumed jurisdiction of the proceedings, but erred in holding the right of action was not barred under the state statute of limitations. Accordingly, its judgment must be reversed and the cause remanded there with instructions to dismiss the libel."

This holding was restated by Justice Frankfurter in *Levinson* v. *Dupree*, 345 U. S. 648; at p. 651:

> "* * * Like the *Garcia* suit, the present libel was brought under a state wrongful death statute, Ky. Rev. Stat. 1946, § 411.130. As we held in *Garcia*, a time limitation deemed attached to the right of action created by the State is binding in the Federal forum. *The Harrisburg, supra*, 119 U. S. at page 214, 7 S. Ct., at page 147."

The same statement was made in *The Tungus* v. *Skovgaard*, 358 U. S. 588, in which the question was whether, in an action brought under the New Jersey Death Statute for death of one on a vessel at a pier in Bayonne, N. J., unseaworthiness could be the basis of an action. The statute, giving such action where death was caused by "wrongful act, neglect or default" was held broad enough to include unseaworthiness. This Court, in referring to an argument similar to appellant's here, stated, page 591:

> "The respondent asks us to uphold the interpretation which the majority of the Court of Appeals has put upon the New Jersey statute. Failing that, a much broader alternative argument is advanced—that a court in a case such as this may disregard completely the conditions which the State has put upon the right it has created, and may apply instead the full *corpus* of the maritime law, free of any qualifications imposed by the State. If death occurs upon navigable waters within a State, the argument runs, the law should seize only upon the blunt fact that there is

some kind of state statute providing some kind of a right of action for death caused by some kind of tortious conduct. That, it is said, is enough to fill the 'void' in the maritime law, which then becomes applicable in all its facets, without further inquiry as to what it is that the State has actually enacted.

This broad argument must be rejected. The decisions of this Court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, *with whatever conditions and limitations* the creating State has attached. That is what was decided in *The Harrisburg*, where the Court's language was unmistakable: '. . . [I]f the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. . . . *The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.*' 119 U. S. 199, at 214. That is the doctrine which has been reiterated by the Court through the years.[1] See *The Hamilton*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 95; *Western Fuel Co.* v.

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[1] That this is the law has been generally understood by the other federal courts. *United New York and New Jersey Pilots Assn.* v. *Halecki*, 251 F. 2d 708 (C. A. 2d Cir.), judgment vacated and cause remanded, *post*, p. 613; *Continental Casualty Co.* v. *The Benny Skou*, 200 F. 2d 246 (C. A. 4th Cir.); *Graham* v. *A. Lusi, Ltd.*, 206 F. 2d 223 (C. A. 5th Cir.); *Lee* v. *Pure Oil Co.*, 218 F. 2d 711 (C. A. 6th Cir.); *Klingseisen* v. *Costanzo Transp. Co.*, 101 F. 2d 902 (C. A. 3d Cir.); *The H. S. Inc., No. 72*, 130 F. 2d 341 (C. A. 3d Cir.); *Feige* v. *Hurley*, 89 F. 2d 575 (C. A. 6th Cir.); *Curtis* v. *A. Garcia y Cia.*, 241 F. 2d 30 (C. A. 3d Cir.); *O'Brien* v. *Luckenbach S. S. Co.*, 293 F. 170 (C. A. 2d Cir.); *Quinette* v. *Bisso*, 136 F. 825 (C. A. 5th Cir.); *The A. W. Thompson*, 39 F. 115 (D.C.S.D.N.Y.); but cf. *Riley* v. *Agwilines, Inc.*, 296 N. Y. 402, 73 N. E. 2d 718; *Kuhn* v. *City of New York*, 274 N. Y. 118, 8 N. E. 2d 300; *O'Leary* v. *United States Line Co.*, 215 F. 2d 708 (C. A. 1st Cir.).

Garcia, 257 U. S. 233; *Levinson* v. *Dupree*, 345 U. S. 648; cf. *Just* v. *Chambers*, 312 U. S. 383.

'[A]dmiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State.' *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245. The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce at all; it may not pick or choose.

It is manifest, moreover, that acceptance of the respondent's argument would defeat the intent of Congress to preserve state sovereignty over deaths caused by maritime torts within the State's territorial waters. The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.' S. Rep. No. 216, 66th Cong., 1st Sess. 3; H. R. Rep.. No. 674, 66th Cong., 2d Sess. 3. The record of the debate in the House of Representatives preceding passages of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong. Rec. 4482-4486." (Italics added.)

More recently, the Second Circuit, in *Cunningham* v. *Rederiet Viadeggen A/S*, 333 Fed. 2d 308 (1964), Judge Waterman speaking held, page 313:

"• • • when an admiralty court adopts a state's right of action for wrongful death, the court is obliged to enforce that right subject to whatever conditions

> and limitations the state has attached to it. The *Tungus* v. *Skovgaard, supra,* 358 U. S. at 592, 79 S. Ct. at 506."

See also, *Williams* v. *Moran, Proctor, Mueser & Rutledge* (S.D.N.Y.—Sugarman, J.), 205 F. Supp. 208 (1962), page 216:

> "It is to be noted that in applying a state wrongful death act to a situation such as here presented, the federal courts will apply the state statute of limitations, *Western Fuel Company* v. *Garcia, supra.*"

Accord: *Allen* v. *U. S.* (C. A. 9), 338 Fed. 2d 160 (1964), in which an action for death occurring in a drydock was dismissed as not commenced within one year as required by the California death statute.

The courts have, without exception, applied the state statute of limitations when applying the state death statute.

Plaintiff cites *Hess* v. *U. S.,* 361 U. S. 314 and *Goett* v. *Union Carbide Corp.,* 361 U. S. 340. Neither case involved the question here. *Hess* v. *U. S., supra,* involved a question of whether the much broader Employer's Liability Act applied to maritime torts, it being held that plaintiff did not prove a cause of action under the Oregon Death statute.

Goett v. *Union Carbide Corp.,* 361 U. S. 340, held that the action should be remanded to the Court of Appeals to determine whether (1) the West Virginia Death Act included a recovery based upon unseaworthiness and (2) the district courts' finding of negligence was correct under the proven substantive law, neither of which questions was considered by the Court of Appeals in reversing the Dis-

trict Courts' award of $20,000, the monetary limit under the West Virginia Death statute.

It is especially significant to note that this Court did not in any way hold that the limit on damages in the West Virginia Act should not apply.

Justice Whittaker's dissent is supportive of respondent's position as is found on pages 346-348:

> "*It is true that when admiralty 'adopts' a State's Wrongful Death statute 'it must enforce* [*it*] *as an integrated whole, with whatever conditions and limitations* the creating State has attached.' The *Tungus, supra,* at 592. But the West Virginia Wrongful Death statute, like most such state statutes, apart from prescribing who may prosecute the action, *the time within which it must be brought,* and the measure and limit of recovery, has attached only the condition that the wrongful 'act, neglect or default, [be] such as would . . . have entitled the party injured to maintain an action to recover damages in respect thereof [if death had not ensued].' W. Va. Code, 1955, [5474] (5). Surely this means that the act, neglect or default, must be such as would, *under other laws*—whether common, statutory, or maritime laws—have entitled the party injured to recover damages in respect thereof 'if death had not ensued.'
>
> Adoption by admiralty of such a remedial statute cannot be permitted to, and does not, so expand the essential purposes and characteristic features of the general maritime law as to interfere with its proper nation-wide harmony and uniformity, *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242. By such adoption, admiralty takes over only the remedy afforded for death by the State's Wrongful Death statute—*albeit the whole thereof.* It does not thereby abandon the non-

conflicting substantive admiralty law which gave rise to the right of action that it would have enforced 'if death had not ensued.' In such a case, the real and substantive right in suit is still the one created by, and—to the extent not conflicting with the adopted State Wrongful Death statute—is governed by the maritime law.

This is what I understood the *Tungus* case to mean when I joined it, and re-examination of it confirms that conclusion. I submit there is not a word in it to the contrary. And this conclusion is buttressed by the separate opinion of my Brother BRENNAN in that case. Although this Court has many times and uniformly held that the maritime law creates no cause of action for wrongful death, and that, in circumstances like these, admiralty 'adopts' the State's Wrongful Death Act, the separate opinion in *Tungus* said, in effect, that admiralty would merely look to see whether the State had enacted a wrongful death statute and, if it had, would not 'adopt' that act but would put it aside and fashion its own remedy for wrongful death, 358 U. S., at 608-609, *which, I thought and still think, is contrary to this Court's cases holding that the maritime law does not create a cause of action for wrongful death and that, in actions for wrongful death arising on the territorial waters of a State, admiralty 'adopts' the State's Wrongful Death Act* cumo onere."

Plaintiff's argument was answered in *Curry* v. *Fred Olsen Line* (CA 9), 367 Fed. 2d 921 (1966), cert. den. 386 U. S. 971, in which it was held that the California Wrongful Death Act did encompass unseaworthiness and stated that the Court had applied the rule that when admiralty adopts the states right of action "it must enforce the right as an integrated whole, with whatever conditions and limitations the creating state has attacked" (p. 923).

> "* * * Appellant [plaintiff], however, points to disagreements among the Justices of the Supreme Court, appearing in the opinion in The Tungus v. Skovgaard, supra, n. 6; United, N. Y. & N. J. Sandy Hook Pilot's Assn. v. Halecki, 1959, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541; Goett v. Union Carbide Co., supra, n. 6; and Hess v. United States, supra, n. 6, as to whether, once a right of action created by a state appears, the state's limitations upon it should also apply. Appellant suggests that it is likely that the Supreme Court will adopt the views expressed by Mr. Justice Brennan, dissenting in *The Tungus,* supra, that once the state affords a remedy in a general way for wrongful death then the right is governed by the general maritime law rather than state law. The foregoing decisions are to the contrary, and it is not our function to guess that the Supreme Court may overrule them and then to apply our guess instead of the rules announced in those decisions."

The cases of *Wilburn Boat Co.* v. *Fireman's Fund,* 348 U. S. 310; *The John G. Stevens,* 170 U. S. 113 and *United N. Y. & N. J. Sandy Hook Pilot's Assn.* v. *Halecki,* 358 U. S. 613, are not supportive of petitioner's argument.

In fact, the *Wilburn Boat* case is contra to petitioner's position. The case involved a policy of fire insurance on a vessel destroyed on navigable waters. This Court pointed out there was no maritime law regarding the validity of warranties in insurance contracts and that the Texas law applied.

The *John G. Stevens* case involved the priority of maritime liens, while in the *Halecki* case, this Court applied the New Jersey Death Act.

Just v. *Chambers,* 312 U. S. 383, involved death in Florida waters, but limited recovery to the value of the vessel, pointing out that the personal liability of the owner

did not survive the death of the injured man. This Court pointed to *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, that the action was barred by limitations and answered the petitioner's argument of lack of uniformity (p. 392):

> "Our decisions in the wrongful death cases also meet the further argument which is addressed to lack of uniformity. For whatever lack of uniformity there may be in giving effect to the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation. Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved. * * *"

In *Chelentis* v. *Luckenbach S.S. Co.,* 247 U. S. 372, this Court, at page 382, clearly states that the uniformity sought in maritime law is that of *commercial* character affecting the intercourse of States with each other or with foreign states.

Moreover, that the "saving clause" is of common law remedies, where the common law is competent to give it (p. 383). This is not a common law remedy nor a common law right.

In *Riley* v. *Agivilines, Inc.,* 296 N. Y. 403, the complaint was dismissed on the ground that no negligence or unseaworthiness was proved, the question being one of the liability of a vessel owner to a longshoreman.

In *Kuhn* v. *City of New York,* 274 N. Y. 111, the applicability of the New York Death Act was never questioned, the only question being the basis of liability, viz., whether the safe place to work doctrine applied to a maritime tort.

If it were intended that everyone killed upon navigable waters were to have the same rights, etc., the Congress could have so provided as it did in the Jones Act, 46 USCA

688 *et seq.*, as to seamen's rights against their employer or in the Death on the High Seas Act, 46 U.S.C.A. 761 *et seq.* but it has not done so, despite this Court's unequivocal statements in the *Garcia, The Harrisburg* and *Tungus* cases, applying the full corpus of the state death act.

CONCLUSION

It is respectfully submitted, that the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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